SUBJECT INDEX.

TABLE OF CASES.

In the Supreme Court of the United States

OCTOBER TERM, 1942.

No.....

VIRGINIAN HOTEL CORPORATION OF LYNCHBURG,

PETITIONER,

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari be issued to review the order of the United States Circuit Court of Appeals for the Fourth Circuit entered January 2, 1943 reversing the order of the United States Board of Tax Appeals (now Tax Court of the United States and hereinafter referred to by that name) entered May 28, 1942.

I.

OPINION BELOW.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit rendered January 2, 1943 is not yet reported, but is printed as a part of the record (R. 45-52).

II.

BASIS OF JURISDICTION.

Jurisdiction is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. Code Ann. 347.

The opinion of the United States Circuit Court of Appeals for the Fourth Circuit was filed and entered January 2, 1943. Application for stay of mandate pending application in this court for writ of certiorari was filed January 27, 1943. An order staying the mandate for thirty days pending the filing of application for writ of certiorari in this court was entered January 28, 1943 and filed January 29, 1943.

III.

QUESTIONS PRESENTED.

The fundamental question for this court's determination is whether the petitioner in computing its depreciation for the year 1938 under Sections 23(l) and (n), 113(b) (1) (B) and 114(a) of the Revenue Act of 1938, 52 Stat. 494, is entitled to restore to the value of its depreciable assets as of December 31, 1937 so much of the depreciation erroneously reported on its tax returns for the years 1931 to 1937, inclusive, as did not reduce its taxable income in the respective years in which

reported and is in excess of the *allowable* depreciation for said respective years.

The answer to the above question depends upon whether depreciation reported on a tax return, to the extent that it is in excess of the *allowable depreciation* and does not reduce or offset taxable income for the year in which reported, is *allowed* within the meaning of Section 113(b)(1)(B) of the Revenue Act of 1938, 52 Stat. 494, solely because of its having been erroneously reported on the tax return.

IV.

SUMMARY STATEMENT.

The facts in the case were stipulated (R. 22-27). The Tax Court of the United States by reference included the facts as stipulated in its finding of facts (R. 34).

The petitioner is a Virginia corporation which has operated a hotel in Lynchburg, Virginia, since January 1, 1931 (R. 22). It is the owner of the furniture, fixtures and other equipment used in connection with the operation of its hotel business. In each of the calendar years ended December 31, 1931 to December 31, 1937 it depreciated its furniture, fixtures and other equipment at certain straight line rates, namely, ten per centum on all of its furniture, fixtures and other equipment except carpets and fifteen per centum upon its carpets (R. 25). These rates were based upon an estimated useful life of ten years for all of its equipment except carpets and six and two-third years for its carpets. The depreciation so computed was reported on its income tax returns for each of the aforesaid years and no question was raised by the Commissioner as to the rates at which said assets were depreciated (R. 25). On its income tax return filed for the year ended December 31, 1938 the petitioner claimed a deduction for

depreciation in the amount of $4,341.97, said deduction for depreciation being calculated at the same rates at which depreciation had been calculated in the preceding years (R. 22). The Commissioner then for the first time determined that the useful life of the furniture, fixtures and other equipment had been under-estimated and that the rates of depreciation used were excessive. He then determined that the useful life of the furniture, fixtures and other equipment, except carpets, was twenty years from their date of acquisition and the useful life of the carpets twelve and one-half years from their date of acquisition (R. 25, 16-17). The Commissioner then deducted from the costs of the property the depreciation theretofore reported by the petitioner on its income tax returns for prior years and the remaining undepreciated cost was taken as the new base for computing depreciation for the year 1938 and subsequent years. The rate of depreciation was then determined on the basis of what remained of the useful life of the depreciable property. Thus on a certain item the cost of which was $15,033.55 and which had been in use six and one-half years and upon which depreciation of $9,771.83 had been reported on its prior tax returns, the Commissioner found that there was an undepreciated cost of $5,261.72 with a useful life of thirteen and one-half years and allowed annual depreciation of $389.76 or an amount which taken annually for thirteen and one-half years would liquidate the remaining undepreciated cost (R. 25, 16-17).

Petitioner contends that the Commissioner should have restored to the cost of the depreciable assets as of December 31, 1937 so much of the depreciation reported on its tax returns for the years 1931 to 1937, inclusive, as did not reduce its taxable income in those years, and was in excess of the amounts of the depreciation deductions to which it would have been entitled if it had used

the rates of depreciation now determined by the Commissioner to be reasonable. This amount is $81,400.25 and represents so much of the depreciation reported by the petitioner on its tax returns for the years 1931 to 1937, inclusive, as did not reduce its taxable income in the respective years in which reported and is in excess of the allowable depreciation for said years (R. 25-26).

V.

REASONS FOR GRANTING THE PETITION.

1. The United States Circuit Court of Appeals for the Fourth Circuit has decided an important question of Federal law which has not been, but which should be, settled by the Supreme Court of the United States.

2. The United States Circuit Court of Appeals for the Fourth Circuit has rendered an opinion in direct conflict with the decision of the United States Circuit Court of Appeals for the Third Circuit in the case of *Pittsburgh Brewing Co.* v. *Commissioner of Internal Revenue* (C. C. A. 3d), 107 F. (2d) 155. The identical question involved in the instant case, and thus in the case of *Pittsburgh Brewing Co.* v. *Commissioner of Internal Revenue, supra,* is now before the United States Circuit Court of Appeals for the Seventh Circuit in the case of *Kennedy Laundry Co.* v. *Commissioner of Internal Revenue*, 46 B. T. A. 70, and also before the United States Circuit Court of Appeals for the Ninth Circuit in the case of *Don Lee, Inc.* v. *United States* (N. D. Cal.), 42 F. Supp. 884.

3. The question presented by this petition involves the proper construction of Sections 23(l) and (n), 113(b)(1)(B) and 114(a) of the Revenue Act of 1938, 52 Stat. 447. Section 23(l) of that statute allows as a deduction from gross income "a reasonable allowance for

the exhaustion, wear and tear of property used in the trade or business, including a reasonable allowance for obsolescence." Section 23(n) provides that the basis upon which such depreciation shall be allowed is that provided in Section 114, which is the section which gives the basis for determining the gain upon the sale or other disposition of property. Section 114 provides that the basis for determining depreciation shall be the "adjusted basis" of Section 113(b); and Section 113(b)(1)(B) provides that proper adjustment shall be made "for exhaustion, wear and tear, obsolescense, amortization, and depletion, to the extent *allowed* (but not less than the amount *allowable*) under this act or prior income tax laws."

It is clear, therefore, that this court must construe the word *allowed* as used in Section 113(b)(1)(B) of the Revenue Act of 1938. The aforementioned conflicting opinions leave taxpayers in doubt as to the proper construction of the word *allowed* and the determination of this question by this court, will settle the point of law and remove the uncertainty and make for uniformity of decisions as to rights of litigants in tax cases.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Fourth Circuit should be granted.

VIRGINIAN HOTEL CORPORATION OF LYNCHBURG,

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February 20, 1948.

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